Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JAMES RICKY JONES
AND VERA JONES ..... PETITIONERS,

versus

CITY OF CARLISLE,
KENTUCKY ..... RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether in a suit alleging municipal liability as per 42 U.S.C. Section 1983, it is necessary to plead and prove a "special relationship" in a fact situation where abusive, municipal policies of refusing to enforce state law and of refusing to train its police force combined with the actions of a private individual to cause the constitutional deprivation?

PARTIES

The parties to this Petition are James Ricky Jones and Vera Jones, Petitioners, and City of Carlisle, Kentucky, Respondent.

Other parties in the proceedings before the United States Court of Appeals for the Sixth Circuit were AIK Selective Self-Insurance Fund, Preferred Risk Mutual Insurance Company, and Mark Byrd. These parties have no interest in the outcome

There are no parent nor subsidiary companies of the parties to this petition.

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OPINIONS BELOW

Appended hereto is the Memorandum Opinion and Order, filed June 12, 1992, by the United States District Court for the Eastern District of Kentucky; the Order, filed July 21, 1992, by the United States District Court for the Eastern District of Kentucky overruling Petitioners' Motion to Alter, Amend, or Vacate the prior District Court Opinion; the Opinion, filed August 27, 1993, by the United States Court of Appeals for the Sixth Circuit; and the Order, filed October 13, 1993, of the United States Court of Appeals for the Sixth Circuit denying Petitioners' Petition for Rehearing.

JURISDICTION

The date of entry of the Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky is June 12, 1992, the date of entry of the Opinion of the United States Court of Appeals for the Sixth Circuit is August 27, 1993, and the date of the Order of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing is October 13, 1993. This Petition for Writ of Certiorari is timely filed pursuant to Rule 13.1 of the Rules of the Supreme Court of the United States within 90 days subsequent to the denial of the timely filed Petition for Rehearing in the United States Court of Appeals for the Sixth Circuit. This Court's jurisdiction is invoked as per 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following are the constitutional, statutory and regulatory provisions involved in this case and are reprinted verbatim in the appendix hereto:

U.S. Const. Amend. XIV, Section 1

42 U.S.C. Section 1983

Kentucky Revised Statute Section 95.015 (Michie ed.)

Kentucky Revised Statute Section 95.710 (Michie ed.)

Kentucky Revised Statute Section 95.760 (Michie ed.)

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Kentucky Revised Statute Section 431.450 (Michie ed.)

601 Kentucky Administrative Regulation 13:010

STATEMENT OF THE CASE

This case originated in the United States District Court for the Eastern District of Kentucky. Jurisdiction was invoked pursuant to 42 U.S.C. Section 1983, 28 U.S.C. Section 1331, and 28 U.S.C. Section 1334.

All factual statements appear in the Petitioners' Complaint (District Court Docket No. 1) unless otherwise noted.

Petitioner, James Ricky Jones, is a citizen of the United States of America and a citizen of the Commonwealth of Kentucky. Petitioner, Vera Jones, is the wife of James Ricky Jones and joins in this Petition in order to preserve her rights under pendent claims in the event this litigation continues. Respondent, Carlisle, Kentucky, is a municipality existing by authority of the law of the Commonwealth of Kentucky and maintaining a police force pursuant to the same authority. Carlisle is the county seat of Nicholas County, Kentucky.

Mark Byrd, at all relevant times, was a citizen and resident of the Commonwealth of Kentucky, primarily residing in Carlisle, Kentucky. Byrd is an epileptic who has suffered from an uncontrolled seizure disorder since infancy.

On or about November 13, 1990, Byrd was operating a motor vehicle on a public highway in Nicholas County, Kentucky, when he experienced an epileptic seizure which caused him to lose control of his vehicle and to have his vehicle cross the center line of the highway into the oncoming lane of traffic where the Byrd vehicle struck head-on a motor vehicle then and there operated by the petitioner, James Ricky Jones. Petitioner was severely and permanently injured as a result of this accident.

Byrd had been involved in numerous motor vehicle accidents and mishaps prior to the accident with petitioner. All of the motor vehicle accidents were occasioned by Byrd's suffering epileptic seizures while operating motor vehicles.

Carlisle police possessed actual knowledge that Byrd was unfit to operate a motor vehicle because of his seizure disorder. This knowledge was gained from investigating many of the accidents caused by Byrd's epilepsy. (Deposition testimony of Ronald Clark, Ronald McDonald, and Darryl McFarland, appended to District Court Docket No. 32).

The statutory law of the Commonwealth of Kentucky is embodied in the Kentucky Revised Statutes, Michie edition (hereinafter "KRS"). Kentucky's statutory obligations for Carlisle police are itemized in the complaint, appended hereto. State law requires Carlisle police to enforce the law of Kentucky, to be sagacious, to faithfully perform their duties, to use uniform citations for traffic law violations, to file written reports of automobile accidents causing prop-

erty damage or personal injury, and state law also gives Carlisle police law enforcement power and responsibility throughout Nicholas County, Kentucky.

At the time of the accident involving petitioner, Byrd possessed a valid motor vehicle operator's license issued by the Commonwealth of Kentucky. The law of the Commonwealth of Kentucky evidences a policy to withdraw the motor vehicle operator's license of a person having a mental or physical infirmity making that person unsafe to operate a motor vehicle. see, KRS 186.570. State policy as evidenced by 601 Kentucky Administrative Regulation 13:010 is to remove the operator's license from a person who has suffered a seizure prior to a reportable motor vehicle accident upon notification to the Commonwealth of Kentucky that a motor vehicle operator has suffered an epileptic seizure. There is no explicit statutory or regulatory requirement for local law enforcement officials to report epileptic drivers to state government in Frankfort, Kentucky, where the epileptic driver's operator's license would be revoked by the Medical Review Board which is an office in the Kentucky Transportation Cabinet, a division of state government. However, the Medical Review Board opens approximately 600 new cases per year, and one-half to three-fourths of these cases come about by virtue of reports from law enforcement officials. Had the Kentucky Medical Review Board been aware of Byrd's epilepsy-related accidents, Byrd's operator's license would have been suspended. (Deposition testimony of Valerie Taylor, p. 19-25, 35-36, District Court Docket No. 20a). Byrd has stated that if he had not possessed a valid operator's license at the time of his accident with petitioner, he would not have been driving a motor vehicle. (Deposition testimony of Mark Byrd, appended to District Court Docket No. 32).

A Carlisle police officer testified to his knowledge that state government would not do anything about Byrd without a report from somebody like the Carlisle police. (Deposition testimony of Roy Fryman, appended to District Court Docket No. 32).

Although Carlisle police knew of Byrd's numerous accidents caused by his epilepsy, the police did nothing. Carlisle police did not make reports of many accidents, the Kentucky State Police have no copies of accident reports other than the accident with petitioner, and Byrd was never given uniform citations or traffic tickets as a result of his dangerous driving. Byrd's operator's license was finally revoked on August 27, 1991, after the Medical Review Board was notified by an attorney. (Deposition testimony of Valerie Taylor, p. 25-26, District Court Docket No. 20a).

Carlisle maintains a policy of refusing to take action to remove impaired operators of motor vehicles from the highway. Carlisle's mayor testified that if Carlisle police know of Byrd's history of epilepsy-related accidents, they should continue to let him drive, "as long as he has a license." (Deposition testimony of Frank Hughes, appended to District Court Docket No. 32). When questioned concerning the existence of a municipal policy of allowing impaired individuals to operator motor vehicles, the mayor stated,

> Well, we have had older people and still got older people right here right today that in my opinion, I don't know, maybe they are not capable of driving but they drive everyday. And if you were going to take their license away from them they are going to die.

Deposition testimony of Frank Hughes, appended to District Court Docket No. 32.

Carlisle police have never sought to revoke the operator's license of any driver. (District Court Docket No. 29).

Further, Carlisle has no training for its police. (Deposition testimony of Frank Hughes, appended to District Court Docket No. 32).

The district court dismissed petitioner's complaint on a Rule 12(b)(6) motion (1) because there was no evidence of a "special relationship" between Carlisle and Byrd or between Carlisle and Jones, (2) because *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189 (1989) required dismissal as Carlisle is not obligated to protect Jones, and (3) because Carlisle's actions cannot be said to be a legal cause of Jones' injuries. The district court also stated, "The most that can be said of the relation between Byrd and the City of Carlisle is that the Carlisle Police purposefully allowed Byrd to continue operating a motor vehicle." The district court also stated, "[t]he State has no duties to members of the general public who are injured as a result of action by third parties, even when the State indirectly facilitated those actions."

On appeal to the United States Court of Appeals for the Sixth Circuit, the district court ruling was affirmed. In affirming, the Sixth Circuit employed a "special relationship" analysis. Relying upon *DeShaney, Martinez v. California*, 444 U.S. 277 (1980) and on *Janan v. Trammell*, 785 F.2d 557 (6th Cir. 1986), the Court stated, "Byrd was not acting as the agent of the City, nor was there a special relationship between the City and Byrd or between City and Mr. Jones." The Sixth Circuit noted petitioner had alleged liability under a failure to train claim as per *Canton v. Harris*, 489 U.S. 378 (1989), but this theory was rejected on the basis that,

> While the City did nothing to prevent Byrd from driving, this inaction was not the "moving force" behind Mr. Jones' injuries. His injuries were directly caused by the epileptic seizure Byrd experienced while he was operating his vehicle.

In holding that *DeShaney* requires a special relationship before a state incurs Section 1983 liability for injury inflicted by a private actor, the Sixth Circuit does not define what a special relationship is. Petitioners believe the Sixth Circuit reads *DeShaney* to require a custodial relationship; that is, prisoners or patients, before liability can attach.

The Sixth Circuit noted that Jones had alleged a theory of recovery based upon a claimed entitlement to enforcement of state laws, but this theory was rejected, being termed nothing more than a "failure to protect" claim which is barred by *DeShaney* because states do not have an affirmative obligation to protect private individuals from the conduct of other private citizens.

Jones' complaint in addition to specifying state law enforcement responsibilities of Carlisle, alleged Carlisle's conduct to be deliberate and conscious as well as reckless, wanton, and gross. Jones specifically alleged that Carlisle's conduct was abusive. It was alleged that Carlisle consciously decided not to enforce the laws of Kentucky against Byrd, and this in fact encouraged Byrd to continue to operate a motor vehicle. Jones also alleged that Carlisle's policies amount to a deliberate indifference to the constitutional rights of persons such as Jones and cause Carlisle police to be inadequate to the task to be performed by them.

ARGUMENT

The Petition for a Writ of Certiorari should be granted because the Sixth Circuit has decided an important question of federal law in a way that conflicts with applicable decisions of this Court. Also, the United States Court of Appeals for the Sixth Circuit has rendered a decision herein which conflicts with decisions of other United States Courts of Appeals.

IMPORTANT QUESTION OF FEDERAL LAW DECIDED BY SIXTH CIRCUIT WHICH IS IN CONFLICT WITH DECISIONS OF THIS COURT.

Petitioner submits there is no place for a "special relationship" analysis in Section 1983 jurisprudence.

The only occasion on which this Court has addressed the "special relationship" concept is *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189 (1989), and in that case, the "special relationship" theory of liability was flatly rejected. As will be discussed subsequently, the "special relationship" analysis employed by the Sixth Circuit in the instant case is substantially different from the "special relationship" analysis advanced in *DeShaney*. It is an anomaly that the Sixth Circuit's "special relationship" analysis relies upon *DeShaney* for its support.

DeShaney was a Section 1983 claim brought on behalf of a minor, Joshua DeShaney, against state child welfare officials who, although having ample reason to believe that Joshua was being abused by his father, did nothing to protect Joshua until such time as his father had already left Joshua permanently brain damaged as a result of repeated assaults.

DeShaney arose in the Seventh Circuit which was presented with a claim that because of a "special relationship"

between Joshua and the state actors, the state became obligated to protect Joshua in a reasonable fashion. The Seventh Circuit rejected the "special relationship" analysis, saying, "We can find no basis in the language of the due process clauses or the principles of constitutional law for a general doctrine of 'special relationship.'" *DeShaney v. Winnebago, Cty. Dept. of Soc. Services*, 812 F.2d 298, 303 (7th Cir. 1987). However, the Third and Fourth Circuits had indicated approval of a special relationship analysis, *DeShaney*, *Id.* at U.S. 194, and so the petition for certiorari was granted. Hence, *DeShaney* presented this Court with the direct question of whether a special relationship analysis was appropriate. This Court responded to the contention by saying, "We reject this argument." *DeShaney*, *Id.* at 198.

In footnote four at 489 U.S. 197, this Court explains that the notion of special relationship appears to have come from a statement in *Martinez v. California*, 444 U.S. 277 (1980), dealing with alleged Section 1983 liability of a state parole board which had paroled a prisoner who later murdered a young girl. In *DeShaney*, it was noted that the special relationship concept appears to have come from a statement in *Martinez* that "[t]he parole board was not aware that appellant's decedent, as distinguished for the public at large, faced any special danger." *Martinez*, *Id.* at 285. This Court emphasized its rejection of special relationship by stating that *Martinez* was decided on the narrow ground that the causal connection between the decision to grant parole and the subsequent murder was too attenuated and remote to allow liability.

DeShaney does go on to state circumstances in which the state is obligated to protect those persons whose freedom has been restrained by the state; that is, prisoners and mental

patients. However, this duty to protect does not arise from a special relationship but, instead, arises from the fact that a state's limitation on that individual's freedom prevents the individual from protecting himself. *DeShaney*, *Id.* at 199-200.

Often overlooked in *DeShaney* is the fact that petitioner *conceded* the state played no part in creating the danger of child abuse. *Id.* at 197, 201. In other words, the state placed Joshua in no worse position than that in which he would have been had the state not acted at all. *Id.* at U.S. 201.

Petitioners submit the true holding of *DeShaney* is that a state's failure to protect an individual against private violence does not constitute a violation of the Due Process clause assuming that the state played no role in increasing the danger of private violence.

The Sixth Circuit employs a special relationship analysis with a twist. Although this Court specifically rejected such analysis in *DeShaney* where it was used in an attempt to prove liability, the Sixth Circuit requires a "special relationship" analysis as a prerequisite for liability. Strangely, the Sixth Circuit reads *DeShaney* to say that this Court found that no special relationship existed between Joshua and the defendant agency or between the abusive father and the agency, and this Court, therefore, affirmed the dismissal of the Section 1983 action on those grounds. With this reading of *DeShaney* as a starting point, the Sixth Circuit goes on to hold that because there was no special relationship, there can be no Section 1983 liability. The Sixth Circuit arrives at this conclusion without questioning the district court's statements that Carlisle Police "purposefully allowed Byrd to continue operating a motor vehicle" and "the State indirectly facilitated those actions" (Byrd's operation of a motor vehicle with a seizure disorder).

The theoretical underpinning of *DeShaney* is the concept that the Constitution safeguards only negative, not positive, liberties. This concept is mentioned in the body of the opinion, *Id.* at U.S. 196-197 and is expounded upon in the dissent of Justice Brennan joined by Justices Marshall and Blackmun.

Jones contends he presents a valid Section 1983 claim because Carlisle's policies are affirmative acts which caused his injury. A municipality, having law enforcement responsibilities, which refuses to enforce the law therefore abuses the law and gives rise to a substantive Due Process violation for which Section 1983 redress is available to Petitioner. Alternatively, Carlisle's policy of no training for its police is a deliberate indifference actionable under *Canton v. Harris, supra.*

Of course, *DeShaney* is the law and should be followed. However, the scope of *DeShaney* is unclear especially in light of the fact that the petitioner in *DeShaney* conceded that the state did nothing to create the danger of child abuse to the petitioner. It is a significant difference in the instant case that the facts fairly can be said to show that Carlisle "purposely allowed" and "indirectly facilitated" the operation of an automobile by an uncontrolled epileptic. Petitioner herein contends the Constitution does protect him from abusive and arbitrary actions by state law enforcement in adopting policies of refusing to enforce laws, thereby depriving him of his "liberty" interests guaranteed by the Fourteen Amendment. However, this point has never been addressed in the instant proceedings because of the court-imposed requirement of special relationship, not found in either Section 1983 or in the cases decided by this Court.

42 U.S.C. Section 1983 states that every person who, under color of law, subjects a citizen of the United States to a deprivation of constitutional rights shall be liable to the party injured. Notably, nothing is said about a special relationship.

To read a special relationship requirement into Section 1983, which has no such requirement, violates the rule that Section 1983 should be liberally construed because it is a remedial statute. In *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), this Court quoted from Congressional debates concerning the passage of Section 1983,

> The act is remedial, and an aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedy for their wrongs to all the people. . . .

Monell, *Id.* at 684.

When Carlisle adopted a policy of refusing to enforce the law concerning the operation of motor vehicles by impaired drivers, Carlisle abused the law. It is this abuse which gives rise to the constitutional tort. This is the teaching of *DeShaney*, *Id.* at U.S. 196, which is in accord with the earlier case of *Monroe v. Pape*, 365 U.S. 167 (1961), in which it is said,

> The question with which we now deal is the narrower one of whether Congress in enacting Section 1979 (now 42 U.S.C. Section 1983), meant to give a remedy to parties deprived of Constitutional rights, privileges, and immunities by an official's abuse of his position. (citations omitted) *We conclude that it did so intend.*
>
> * * * * * * * * * * * * *
>
> The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, *neglect*, intolerance or otherwise, *state laws might not be enforced* and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Monroe, *Id.* at 172 and 180, parenthetical statements and emphasis supplied.

This Court previously has ruled that issues of whether state action causes a constitutional deprivation should be determined by principles of common law tort liability.

> Section 1979 (now 42 U.S.C. Section 1983) should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

Monroe, *Id.* at 187, parenthetical statement supplied.

Common law tort principles of intervening and superseding causes make it clear that Carlisle caused Jones' injury. "Special relationship" is not a principle of common law tort liability. Instead, it is an artificial, result-oriented standard manufactured by a desire for a simple solution to

the complex issues presented by Section 1983. Not only has special relationship never been defined, petitioners submit that it is not capable of a rational definition.

Jones submits that the correct analysis in evaluating his claim is found in the concurring opinion of Justice Stevens in *Daniels v. Williams*, 474 U.S. 327 (1986) at 336-343. Petitioner Jones asserts a "substantive due process claim" under the Due Process Clause of the Fourteenth Amendment. By this he means that there are certain arbitrary government actions, such as consciously deciding not to enforce state law, which are barred regardless of the procedures used to implement those actions. Petitioner claims a constitutional right of body security of which he has been deprived by Carlisle. It is petitioner's belief that the analysis proposed by Justice Stevens in his separate opinion in *Daniels* has been followed by this Court in *Collins v. City of Harker Heights, Tex.*, ____ U.S. ____ , 112 S.Ct. 1061 (1992) in which Justice Stevens writes for an unanimous court. Although liability was not found in *Collins*, that opinion certainly implies that municipal policies which can be characterized as arbitrary or conscience shocking in a constitutional sense will give rise to Section 1983 liability.

CONFLICT AMONG CIRCUITS

Petitioners submit the law of the various United States Courts of Appeals is in conflict concerning the question of whether a special relationship is necessary before Section 1983 liability can be incurred.

SIXTH CIRCUIT

In the instant case, the Sixth Circuit relies upon *DeShaney*, *Martinez* and on its own case of *Janan v. Trammell*,

supra., (another case alleging liability against a parole board for paroling a prisoner who later committed murder), in ruling that a special relationship is necessary before Section 1983 liability can be incurred. By this, the Sixth Circuit means that unless there is a special relationship between the private individual directly causing injury and the state or a special relationship between the victim and the state, there cannot be Section 1983 liability. The Sixth Circuit never defines what is the special relationship between the victim and the state, but the Sixth Circuit indicates that the special relationship between the victim and the state must be such that state action has placed the victim, as distinguished from the public at large, in special danger from the private actor. *Janan*, *Id*. at 560.

This holding of no liability would be true even though the state's actions caused the constitutional injury. In *Nishiyama v. Dickson County*, Tenn., 814 F.2d 277 (6th Cir. 1987) it is stated,

> In our view, a person may be said to act in such a way as to trigger a Section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to be aware of it, and of a magnitude such that it is highly probable that harm will follow.

Nishiyama, *Id*. at 282.

The Sixth Circuit found Section 1983 liability to exist in *Nishiyama* because Dickson County was in a special relationship with its prisoner to whom the county furnished a patrol car for his private use and who used the patrol car to stop an innocent motorist and murder her.

Nishiyama and the instant case can be read together for the proposition that even though a state actor does some-

thing that can be a legal cause of a constitutional deprivation, there is no liability absent a special relationship, probably custodial in nature, between the state and the constitutional tortfeasor or unless a state act subjects the particular victim to a danger not encountered by the public at large. The Sixth Circuit appears to say that liability can be incurred only by harming those in custody, prisoners and patients. Also, a state policy which injures unidentified members of the public at large is not actionable. Moreover, the lack of a special relationship in the Sixth Circuit not only prevents a due process violation from occurring, but it also forecloses any claim that state policy caused a constitutional deprivation because of a failure to train as per *Canton v. Harris*, 489 U.S. 378 (1989).

There is no support for the Sixth Circuit's interpretation either in the language of Section 1983 or in any decision of this Court.

D.C. CIRCUIT

The D.C. Circuit seems to require a special relationship before a state actor can incur liability for injury inflicted upon a victim, although no definition of special relationship is given. *Harris v. District of Columbia*, 932 F.2d 10, 13 (D.C. Cir. 1991).

FIRST CIRCUIT

The First Circuit requires a special relationship meaning some kind of involuntary state commitment of the victim even if the state acts with deliberate indifference to the victim's needs. *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987, 993 (1st Cir. 1992).

SECOND CIRCUIT

The Second Circuit does not seem to require a special relationship in order for a state to be liable for a constitutional deprivation committed by a private actor. If the state actor assisted in creating or increasing the danger to the victim, then there is liability. *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993). The petitioner believes this is the correct view.

THIRD CIRCUIT

The Third Circuit appears to require a state to have a custodial relationship with the victim before the state will be responsible for injury inflicted by a private citizen. In *Brown v. Grabowski*, 922 F.2d 1097 (3rd Cir. 1990), police were not responsible for the murder of a female by her boyfriend even though New Jersey law required the police to inform the victim of her right to file a complaint based upon domestic violence and even though the police department was completely unsupervised and not complying with the state domestic violence law. A custodial relationship was necessary between the state and the victim. In *D.R. By L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3rd Cir. 1992), school officials were not liable for extended sexual abuse of high school students by other students because there was no custodial relationship; that is, special relation, between the school officials and the abused children. See, also, *Black by Black v. Indiana Area School Dist.*, 985 F.2d 707 (3rd Cir. 1993).

FOURTH CIRCUIT

Piechowicz v. U.S., 885 F.2d 1207 (4th Cir. 1989) at page 1215 interprets *DeShaney* to hold that substantive due pro-

cess only protects the liberty interests of persons affirmatively restrained.

FIFTH CIRCUIT

The Fifth Circuit takes a mixed position in holding that *DeShaney* does not require police to arrest law breakers, and, therefore, there is no constitutional violation in such a situation. *McKee v. City of Rockwall, Tex.*, 877 F.2d 409 (5th Cir. 1989). The Fifth Circuit would hold that a special relationship exists between school officials and students so as to allow Section 1983 liability when students are sexually molested by their teacher and the supervisors have sufficient reason to know of this. This is because the school relation is a "special relation." *Doe v. Taylor Independent School Dist.*, 975 F.2d 137 (5th Cir. 1992). However, in *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992), the Fifth Circuit holds that even though inaction usually will not implicate Due Process guarantees, Section 1983 liability can be incurred when the state does something to create danger of violence accompanied by conduct showing a state of mind indicative of an abuse of power shocking the conscience.

SEVENTH CIRCUIT

The Seventh Circuit denies a doctrine of special relationship in constitutional law. *DeShaney v. Winnebago Cty. Dept. of Soc. Services*, 812 F.2d 298 (7th Cir. 1987).

In *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990), the Seventh Circuit held a municipality could incur Section 1983 liability for inadequate procedures in failing to recover a deadly weapon from a suspended, mentally ill police officer who shoots and kills a neighbor even though the officer was not acting under the color of state law at the time

of the shooting. The *Gibson* court shows how the result is consistent with *DeShaney* in the footnote appearing at 910 F. 2d 1521-1522.

The Seventh Circuit recognizes that the key to Section 1983 liability in situations involving private individuals as well as state actors is to control governmental abuse of power; *Salazar v. City of Chicago*, 940 F.2d 233, 238 (7th Cir. 1991); and to guard against excesses of governmental power; *Dawson v. Milwaukee Housing Authority*, 930 F.2d 1283 (7th Cir. 1991). The Seventh Circuit realizes that *DeShaney* simply holds that a mere failure to protect a private person from injury by another is not actionable.

The Seventh Circuit also holds that state child welfare officials can incur Section 1983 liability for placing children in foster homes of persons known to be incompetent and abusive and who in fact abuse the children. *K.H. Through Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). This is because in such situations, the state action does the harm even though the abuse is inflicted by other persons. *K.H. Through Murphy*, Id. at 848-849.

EIGHTH CIRCUIT

The Eighth Circuit states that there is no Section 1983 liability unless there is a custodial relationship or unless a state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced. *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006, 1010 (8th Cir. 1992).

NINTH CIRCUIT

In the Ninth Circuit, state actors can incur liability by arresting a drunk driver and impounding his car, thereby

stranding the driver's female passenger in a high crime area where she was later raped. This is because the police put the female passenger in jeopardy. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989). Yet, police do not incur Section 1983 liability by failing to protect an individual from harassment and abuse by her former husband because *DeShaney* limited the circumstances giving rise to a special relationship, presumably custodial circumstances, and without this special relationship, there is no obligation. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990). The Ninth Circuit would recognize an exception to the general rule of no liability for failure to protect when the state affirmatively does something which creates a danger which places the plaintiff in danger. *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992).

The Ninth Circuit therefore seems to have a mixed position by requiring a special relationship while at the same time recognizing liability when the state does something to create the danger to the victim.

TENTH CIRCUIT

The Tenth Circuit would not allow a plaintiff to recover under facts identical to those appearing in the Ninth Circuit case of *Wood v. Ostrander* because there is no constitutional right to personal security absent a custodial relationship. *Hilliard v. City and County of Denver*, 930 F.2d 1516, 1520 (10th Cir. 1991). The case of *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992) also holds that absent the custodial relationship, there is no constitutional duty to act.

ELEVENTH CIRCUIT

The Eleventh Circuit relies heavily on Sixth Circuit

precedent in holding that in order for Section 1983 liability to exist, there must be a special relationship between the state and the constitutional tortfeasor or there must be a showing that the victim, as opposed to the general public, faced a special danger. *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348 (11th Cir. 1989).

Although this Court rejected and discouraged the use of a special relationship analysis in *DeShaney*, the *DeShaney* case has spawned a significant body of special relationship law in the Courts of Appeals. The decisions of the Courts of Appeals are in conflict concerning whether *DeShaney* requires a special relationship analysis, and if there is such a requirement, the Courts of Appeals differ on what the requirement is.

It seems clear that the Sixth Circuit on authority of *DeShaney*, requires a special relationship for Section 1983 liability to attach and this is true without regard to whether or not state action causes the constitutional harm to the victim. However, *DeShaney* only holds that a state has no Due Process obligation to protect its citizens against private violence. *DeShaney* does mention that a state has an obligation to protect private individuals in custodial situations where the state has affirmatively restrained the freedom of the private individual, meaning prisoners and mental patients, but the Sixth Circuit reads *DeShaney* to mean that a state is only obligated to protect its prisoners and patients and is not obligated to protect its citizens at large even though it fairly can be said that state action caused the injury. This is true even though state action "indirectly facilitates" and "purposefully allows" a victim to be harmed by a private individual.

The Sixth Circuit's view appears to be the same as the views of the D.C. Circuit, the First Circuit, the Third Circuit, the Fourth Circuit, the Eighth Circuit, the Tenth Circuit, and the Eleventh Circuit.

Contrary views are held by the Second and the Seventh Circuits. In these Circuits, the issue is not whether a special relationship exists, but, instead, the issue is whether the state actor assisted in creating or increasing the danger to the victim and whether the state action can be characterized as either an abuse of governmental power or an excess of governmental power.

Jones suggests that had this case arisen in the Seventh or Second Circuits, he would have survived the motion to dismiss and would have gone to trial.

The Fifth Circuit appears to straddle the divide by requiring and finding a special relationship in situations where school officials ignore sexual abuse of students and by noting that a lack of state action can implicate Due Process guarantees when the state does something to create the danger of violence in circumstances showing a state of mind indicative of an abuse of power which shocks the conscience.

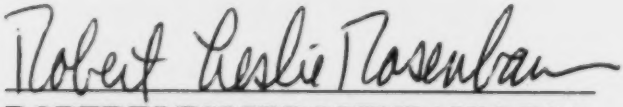
The Ninth Circuit has employed a special relationship analysis, but it also recognizes liability when the state causes the injury, albeit not by itself.

Jones asserts that abusive conduct by state actors such as a conscious refusal to enforce state law thereby causing deprivation of a liberty interest does give rise to Section 1983 liability. To find otherwise is to construe Section 1983 in a narrow and constricted manner and to ignore the plain language of Section 1983 which allows redress when a person acting under color of law causes a deprivation of a constitutional right.

Monroe, *Id.* at 180, clearly states that liability is incurred when by reason of neglect, state laws might not be enforced, and *Monroe*, *Id.* at 187, clearly states that Section 1983 "[s]hould be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should issue so as to affirm there is no place for a special relationship analysis in Section 1983 jurisprudence. This Court rejected the special relationship analysis in *DeShaney*. However, several Courts of Appeals read *DeShaney* to require a special relationship. The Petition should be granted in order to resolve this conflict and to reaffirm *DeShaney*.

Respectfully submitted,



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